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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO._____

L. B. Sullivan, G. J. Ruppenthal, and H. D. Alford,
Petitioners,

Vs.

Barbara A. Nesmith and Richard A. Nesmith,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners L. B. Sullivan, G. J. Ruppenthal and H. D. Alford pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on May 30, 1963, and in which case rehearing was denied on August 15, 1963.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, infra, p. 12, is reported in 318 F2d 110. The opinion of the Circuit Court of Appeals on application for rehearing, printed in Appendix C hereto, infra, p. 56, is reported in 319 F2d 859.

JURISDICTION

The Judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on May 30, 1963. P. 12, infra. Rehearing was denied on August 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Are defenses of justification, mistake of law or fact and good faith available to a police officer in a suit in tort under the Civil Rights Statute?

Did the Court below err in holding there was liability as a matter of law, thereby depriving Petitioners of a favorable jury verdict?

Can an Appellate Court re-examine facts determined by a jury?

Does the judgment of the Court below deprive the petitioners of a jury trial?

Did the Court below follow Alabama decisions in reaching the result it did on the counts founded on diversity jurisdiction?

Did the Court below err in reversing the judgment of the District Court?

STATUTES INVOLVED

The statutory provisions involved are Amendment Seven to the Constitution of the United States; Section 18 of Chapter 20 of the Municipal Code of the City of Montgomery, Alabama, and Title 42, Sections 1983 and 1985 of the United States Code. They are printed in Appendix A, hereto, infra, pp. 9-11.

STATEMENT OF THE CASE

Respondents, Barbara A. Nesmith and Richard A. Nesmith, filed separate civil actions in the United States Dis-

trict Court for the Middle District of Alabama on May 9, 1961, and on May 10, 1961, respectively, alleging that the Petitioners had falsely arrested them (Count I), had maliciously prosecuted them (Count II), and had deprived them of a constitutional right while acting under color of state law (Count III). (R. 2, 8). Count I of each complaint was amended on June 28, 1961. (R. 15, 17). The jurisdiction of the District Court as to the counts for false imprisonment and malicious prosecution was invoked because of diversity of citizenship, the Plaintiffs being citizens of Illinois and the Defendants being citizens of Alabama. (Title 28, Section 1332, United States Code). The jurisdiction of the District Court was invoked as to the Civil Rights Count under the Civil Rights Statute (Title 42, Sections 1983 and 1985, United States Code.) The cases were consolidated for trial in the District Court and came on to be heard on the 30th day of November, 1961, and the 1st day of December, 1961, before the Court and a jury. (R. 42). The jury returned a verdict for the Petitioners on each complaint. (R. 477, 478). The Respondents each filed a motion for a judgment non obstante veredicto or in the alternative for a new trial. (R. 479, 488), which motions were overruled and denied (R. 496). An appeal was taken by the Nesmiths from the judgment of the District Court entered pursuant to the jury verdicts in each case. (R. 498, 499). The United States Court of Appeals for the Fifth Circuit reversed the judgment of the District Court, with one Judge dissenting. Appendix B, infra, pp. 13-55, 318 F2d 110. A timely petition for rehearing was filed, which was denied on August 15, 1963, with one Judge dissenting. Appendix C, infra, pp. 56-59. 319 F2d 859.

REASON FOR GRANTING THE WRIT

1. The decision of the Court below in the instant case seems to be in conflict with the decisions of this Honorable Court in **Swafford v. Atlantic Coast Line R. Co.**, 350 U. S. 807, 100 L. ed. 725, 76 S. Ct. 51. (1955), reversing 220 F2d 901 (1955); **Gibson v. Phillips Petroleum Co.**, 352 U. S.

874, 1 L. ed. 2d 77, 77 S. Ct. 16 (1956), reversing 232 F2d 13 (1956); **Lumberman's Mutual Casualty Co. v. Elbert**, 348 U. S. 48, 99 L. ed. 59, 75 S. Ct. 151 (1954); **Parsons v. Bedford**, 28 U. S. 433, 3 Pet. 433 (1830); **Atlantic & Gulf Stevedores v. Ellerman Lines**, 369 U. S. 355, 7 L. ed. 2d 798, 82 S. Ct. 780 (1962); and **Sentilles v. Inter-Carribean Shipping Corp.**, 361 U. S. 107, 4 L. ed. 2d 142, 80 S. Ct. 173 (1959).

In **Lumberman's Mutual Casualty Co. v. Elbert** (348 U. S. 48) and **Parsons v. Bedford** (3 Pet. 433) this Court said that appellate review in federal courts is ultimately limited by the Seventh Amendment. In the case of **Parsons v. Bedford**, this Court stated:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. ' ' ' No fact tried by a jury shall be otherwise re-examinable in any Court of the United States than according to the rules of the common law'. This is a prohibition to the Courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the Court where the issue was tried, or to which the record was properly returnable, or to award a venire facias de novo by an appellate court for some error of law which intervened in the proceedings."

UNDER THE INFLUENCE, IF NOT THE COMMAND OF THE SEVENTH AMENDMENT, DISPUTED QUESTIONS OF FACTS ARE LEFT TO THE JURY.

In **Atlantic & Gulf Stevedores v. Ellerman Lines**, 369 U. S. 355, 7 L. ed. 2d 798, 82 S. Ct. 780 (1962), this Court held:

> "We might agree with the Court of Appeals had the questions of fact been left to us. But neither we

> nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

This Honorable Court has also held that:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Sentilles v. Inter-Carribean Shipping Corp., 361 U. S. 107, 4 L. ed. 2d 142, 80 S. Ct. 173.

2. The decision below also seems to be in conflict with this Court's decisions of **Breard v. Alexandria**, 341 U. S. 622, 95 L. ed. 1233, 71 S. Ct. 920 (1951); **Chaplinsky v. New Hampshire**, 315 U. S. 568, 86 L. ed. 1031, 62 S. Ct. 766 (1941); **Cantwell v. Connecticut**, 310 U. S. 296, 84 L. ed. 1213, 60 S. Ct. 900 (1939); in that the effect of the decision below apparently is to hold that First Amendment rights are absolutes. The holding by the Court below apparently fails to recognize that this Court's decisions in **Garner v. Louisiana**, 368 U. S. 157, 7 L. ed. 2d 207, 82 S. Ct. 248 (1961) and **Edwards v. South Carolina**, 372 U. S. 229, 9 L. ed. 2d 697, 83 S. Ct. 680 (1963) **do not suggest** that a crime of breach of the peace is not punishable where the evidence is sufficient, even in a criminal proceeding.

3. The decision of the Court below is believed to be erroneous and at variance with the decision in **Agnew v. City of Compton**, 239 F2d 226 (9 Cir., 1956); cert. den. 353 U. S. 959, 1 L. ed. 2d 910, 77 S. Ct. 868. In **Agnew**, the Court held that **no one has a constitutional right to be free from a law officer's honest misunderstanding of the law or facts in making an arrest.** The Court below, it is believed, has imposed a standard of liability on the part of the Petitioners which the law does not place on them. In

fact, it is believed that the proper rule is that a law officer is presumed to do his duty. While this Court's decision in **Monroe v. Pape,** 365 U. S. 167, 5 L. ed. 2d 492, 81 S. Ct. 473 (1961) states that a police officer while acting under color of law is liabile for the natural consequences of his acts, it is not believed that this Court intended to hold that in cases wherein the evidence was in conflict that a person could be deprived of the right to have a jury decide these disputed issues of fact, and that there was no defense available to a police officer such as good faith, mistake of law or fact, or justification.

4. The question seems to be one of great importance. Except by way of denying certiorari in **Agnew v. City of Compton,** 239 F2d 226 (9 Cir., 1956) cert. den. 353 U. S. 959, 1 L. ed. 2d 910, 77 S. Ct. 868, there seems to be no decision by this Court which sets out the defenses which may be asserted in a Civil Rights action seeking to establish tort liability under the authority of **Monroe v. Pape,** supra. While **Monroe v. Pape,** supra, decided that a tort action is maintainable, the question of allowable defenses and sufficiency of the evidence and the right to jury trial was not in issue. Since **Monroe v. Pape,** supra, numerous civil actions have been filed and the foregoing questions should be determined by this Honorable Court to guide the bench and bar in this new field of tort law.

5. The decision below fails to follow the Alabama law with respect to the false imprisonment and malicious prosecution counts. Under Alabama law, there was probable cause for the arrest of the Respondents, and certainly there was a conflict in the evidence which made the issue of probable cause one for the jury. Under **Erie,** Alabama law must be applied to Counts I and II, where jurisdiction rests on diversity. An Alabama case holding that probable cause is an issue of fact when the facts are disputed is **Key v. Dozier,** 1949, 252 Ala. 631, 42 So. 2d 254.

Furthermore, the Alabama rule with respect to probable cause in a malicious prosecution action is that where there has been a conviction, even though later reversed, the con-

viction is prima facie evidence that probable cause existed. **Jordan v. Wilson,** 1955, 263 Ala. 625, 83 So. 2d 345; **ex parte Kemp,** 1919, 202 Ala. 425, 80 So. 809. Since both Respondents were, in fact, convicted, the Court's finding below that there was no justification for the arrests seems to be in conflict with Alabama decisions.

The Court below further made the following erroneous finding:

> "Indulging this and all other assumptions favorably to the jury verdict, there is yet no Alabama case to indicate that the suspected threat of mob violence at the hands of law breakers may be avoided by arresting those whose actions are perfectly peaceful and legally and constitutionally protected merely because such lawful and peaceful conduct provacatively incites the incipient mob. And we are equally clear that Alabama would not do so in the future."

The above quoted finding by the Court below seems to be erroneous in view of the decision of the Alabama Court of Appeals in **Abernathy v. State,** 155 So. 2d 586; cert. den. 155 So. 2d 592. There, the Alabama Court said:

> "The question of whether certain conduct constitutes a breach of the peace depends largely upon the facts of each particular case and the circumstances surrounding the incident. An act which would be lawful in some circumstances may amount to a breach of the peace if done under other circumstances."

The holding of the Alabama Court has found acceptance by this Court. The rule is stated in **Feiner v. New York,** 340 U. S. 315, 320, 71 S. Ct. 303, 306, 95 L. ed. 295 (1950):

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. **It includes not only violent acts but acts and words likely to produce violence in others** * * *".

(Emphasis added)

Even assuming that the facts were not sufficient to show a breach of peace to the judicial mind, the standard for tort liability should not be so circumscribed. To so circumscribe a police officer's action would mean that the policeman, in every arrest, must make sure the conviction will stand up on appeal to the highest court or he is guilty of a deprivation of a civil right, as a matter of law. Surely this cannot be the test, since members of this Court are sometimes in disagreement as to what constitutes a constitutional right.

6. Clearly, the question presented is of importance in the administration of the Civil Rights Act and to correct the erroneous application of Alabama law and for the further protection of the individual petitioners' right to a trial by jury as guaranteed by the Seventh Amendment, since the most practical and effective safeguard of liberty and justice is the right of trial by jury.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

JOHN P. KOHN
Counsel for Petitioner
C. J. Ruppenthal

CALVIN M. WHITESELL
Counsel for Petitioners
H. D. Alford and L. B. Sullivan.

October 29 1963
Date

APPENDIX A

As amended by Ordinance No. 11-60, effective March 24, 1960, Section 18, Chapter 20, City Code of Montgomery, Alabama, provided:

> "It shall be unlawful for any person to disturb the peace of others by violent, profane, indecent, offensive or boisterous conduct or language, or by conduct calculated to provoke a breach of the peace."

Title 42, Section 1983, United States Code, provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

Title 42, Section 1985, United States Code, provides:

"(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat; any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

"(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from

attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery

of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Title 28, Section 1332, United States Code, provides:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and is between:

(1) Citizens of different States:

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) The word "States", as used in this section, includes the Territories and the District of Columbia. June 25, 1948, c. 646, 62 Stat. 930.

Amendment VII to the Constitution of the United States provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.